

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TOMAHAWK MANUFACTURING, INC.
and FORMTEC, LLC,

Plaintiffs

v.

SPHERICAL INDUSTRIES, INC., et al.,

Defendants

Case No.: 2:23-cv-01007-APG-NJK

**Order (1) Denying Defendants’
Applications for Orders to Show Cause
and (2) Granting Defendants’ Request for
Judicial Notice**

[ECF Nos. 383, 470, 472]

Plaintiffs Tomahawk Manufacturing, Inc. and Formtec, LLC sue the defendants¹ for a variety of claims, but the parties’ focus in this litigation has generally been on the plaintiffs’ allegations that the defendants misappropriated trade secrets. The defendants move for an order to show cause why I should not hold the plaintiffs in contempt of a protective order for publicly disclosing the alleged trade secrets, dismiss the plaintiffs’ amended complaint for alleged fraud on the court because no trade secrets exist, and revoke the out-of-state counsel’s pro hac vice status for alleged misconduct related to filings with the U.S. Patent and Trademark Office (USPTO).

I deny the motions for sanctions because I find no grounds for contempt, dismissal, or sanctions. I grant the defendants’ unopposed request for judicial notice of a filing in the Eastern District of Wisconsin.

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¹ Spherical Industries, Inc.; Spherical Industries Holdings LLC; Christopher Duggan; Will Hardy; Spherical Industries, LLC; Entourage International, Inc.; and BlockXchange, Inc.

A. Fraud on the Court

I have “inherent power to sanction a party or its lawyers . . . for “willful[] abuse [of the] judicial processes.” *Gomez v. Vernon*, 255 F.3d 1118, 1133-34 (9th Cir. 2001) (quotation omitted); *see also Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107 (2017) (stating that a court’s inherent power “includes the ability to fashion an appropriate sanction for conduct which abuses the judicial process” (quotation omitted)). The defendants argue that the plaintiffs have committed a fraud on the court in three ways: (1) claiming certain engineering drawings were trade secrets that the defendants misappropriated; (2) suing on trade secrets that their principal admitted have been in the public domain since 2012; and (3) committing a fraud on the USPTO.

1. Engineering Drawings

The defendants make several arguments about engineering drawings that the plaintiffs identified in this case as trade secret material. The defendants first assert that the plaintiffs’ claim that they have trade secrets in the engineering drawings is meritless because the drawings the plaintiffs rely on are labeled “patent pending.” I reject this argument because the defendants do not explain the significance of this point. The mere fact that something is labeled patent pending does not show the material is not a trade secret. The drawings are also marked as Formtec’s proprietary information that is “not to be used by anyone without [Formtec’s] written permission.” ECF No. 383-9 at 13-15.

Second, the defendants argue that the plaintiffs have not yet proven that these drawings depict a product that can work in the real world. Again, the defendants do not explain the significance of this assertion, even if true.

1 Third, the defendants argue that the plaintiffs cannot show the trade secret was
2 misappropriated because the drawings in the defendants' provisional patent applications are not
3 the same as the allegedly stolen drawings. But the defendants again do not explain how a
4 difference in the drawings proves that the defendants did not misappropriate trade secrets such
5 that case terminating or other sanctions are appropriate. The defendants could have
6 misappropriated trade secrets but not copied them directly into their provisional patent
7 applications. I therefore deny the defendants' motion based on the engineering drawings.

8 2. In the Public Domain

9 The defendants assert that the plaintiffs know they have no trade secrets in this case
10 because the plaintiffs' principal, Robert Tournour, testified at his deposition that the plaintiffs'
11 trade secrets have been available in the public domain since at least 2012. They also assert that
12 Tomahawk argued in a lawsuit in Oregon that the alleged trade secrets in this case are not
13 confidential. The plaintiffs respond that the defendants mischaracterize Tournour's testimony,
14 ignore the errata Tournour completed after reviewing his deposition transcript, and misrepresent
15 what Tomahawk argued in the Oregon case.

16 *a. Tournour's Testimony*

17 Tournour is the sole owner of Tomahawk and the 95% owner of Formtec. ECF No. 396-5
18 at 4. When asked about a specific type of product that is part of the alleged trade secrets,
19 Tournour stated that "the master patent would cover that" and that the patent is publicly
20 available. *Id.* at 8, 34, 39. The defendants assert this means that Tournour admitted the alleged
21 trade secret was publicly revealed through the master patent. However, during his deposition,
22 Tournour also testified that Formtec owns trade secrets related to technology that has been at the
23 heart of this lawsuit that is not in the public domain. *Id.* at 6, 45-46, 57, 122. And post-

1 deposition, Tournour clarified his testimony to state that he was “not sure about trade secrets, but
2 in [his] mind, the claims of the master patent would cover that.” *Id.* at 119.

3 The cited deposition testimony does not support the defendants’ request for case-
4 terminating sanctions or sanctioning counsel. Tournour expressed that Formtec has trade secrets
5 related to the technology at issue and expressed his opinion, as a lay person, that a product
6 produced using that technology would fall within the master patent’s claims. A patent does not
7 necessarily destroy the secrecy of information not publicly disclosed in the patent. *See Henry*
8 *Hope X-Ray Prods., Inc. v. Marron Carrel, Inc.*, 674 F.2d 1336, 1342 (9th Cir. 1982) (where a
9 patented apparatus contained features that were not disclosed in a patent, the undisclosed features
10 qualified for protection as trade secrets). The defendants have not shown that the patent
11 discloses all the plaintiffs’ trade secrets. For example, the defendants do not argue or present
12 evidence to show that a patent or patent application publicly reveals the information in the
13 engineering drawings. Whether the plaintiffs have trade secrets and whether the defendants
14 misappropriated those secrets are matters to be resolved on the merits in this case.

15 *b. The Oregon Action*

16 The defendants assert that in the Oregon case between James Wolff (who is not a party in
17 this case) and Tomahawk, Tomahawk argued that information related to the alleged trade secrets
18 in this case was not confidential. Tomahawk responds that the defendants are misrepresenting
19 Tomahawk’s argument.

20 Tomahawk did not argue in the Oregon lawsuit that the alleged trade secrets in this case
21 were not confidential information within the meaning of trade secret law. Rather, it argued that
22 the alleged trade secrets did not count as “Confidential Information” as that term was specifically
23 defined in a 2010 non-disclosure agreement (NDA) between Wolff and Tomahawk. *Wolff v.*

1 *Tomahawk Mfg.*, No. 3:21-cv-880-SI, 2024 WL 3540845, at *4 (D. Or. July 24, 2024). The
2 2010 NDA required that if Wolff wanted information that he conveyed orally to Tomahawk to be
3 covered by the 2010 NDA, then Wolff had to notify Tomahawk in writing that he considered that
4 information to be “Confidential Information” under the 2010 NDA. *See id.* at *7-8.² Tomahawk
5 was thus arguing that the information was not Wolff’s confidential information. Tomahawk’s
6 position in the Oregon litigation is the same as it is here: that the plaintiffs own the disputed
7 technology under the 2012 FOT (Fiber Orientation Technology) Agreement. *See id.* at *6
8 (“Tomahawk continues to assert that the Disputed Technology falls under FOT and Wolff is
9 prohibited from claiming any rights arising out of FOT or any product relating to FOT under the
10 FOT Agreement.”); ECF No. 309 at 7-8 (the plaintiffs’ amended complaint in this case alleging
11 that under the FOT Agreement, Formtec owns and controls the “technology and the intellectual
12 property,” with Wolff’s company having a minority interest). The defendants have not identified
13 where in the Oregon filings Tomahawk argued that the technology was publicly available or was
14 not confidential information belonging to the plaintiffs. Therefore, there is no basis to dismiss
15 the amended complaint or to sanction the plaintiffs or their counsel based on what Tomahawk
16 argued in Oregon.

17 3. Fraud on the USPTO

18 The defendants argue that the plaintiffs’ attorney, Phillip Weiss, committed fraud on the
19 USPTO. They assert Weiss did so by using non-party Wolff’s signature on a patent form and a
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21 ² *See also id.* at 7 (“Tomahawk contends that Wolff can have it one of two ways—either Wolff’s
22 claimed technology in his motion falls under FOT and he gave the necessary notice in December
23 2010 to protect it but it falls within the FOT Agreement, or it does not fall under FOT and then
he never gave any written notice as required by the 2010 NDA and the technology is not
protected under that document. Either way, Tomahawk argues, Wolff cannot obtain summary
judgment in his favor.”).

1 power of attorney to apply for U.S. Patent No. US2024/0334957 (the '957 patent) that identifies
2 Wolff as the inventor despite (1) Wolff seeking to disqualify Weiss as acting as his counsel and
3 (2) Wolff never having seen a diagram in the patent even though he is identified as the inventor.
4 The plaintiffs respond that they were required to support a continuation patent application with
5 the originally filed application, including the page with Wolff's signature. They also argue that
6 the defendants do not have standing to raise these arguments because Wolff is not a party to this
7 case, and that Wolff cannot challenge the filing either because Wolff is estopped from attacking
8 patent rights that he assigned to the plaintiffs.

9 The defendants do not explain how, nor cite authority to support, an alleged fraud against
10 a non-party (Wolff) before a different entity (the USPTO) by an attorney who has not made an
11 appearance before this court (Weiss) should result in dismissing the plaintiffs' amended
12 complaint or sanctioning the plaintiffs and their counsel in this case. I therefore deny this
13 request.

14 **B. Contempt of Court**

15 In their first motion for contempt, the defendants argue that the plaintiffs violated the
16 order filed at ECF No. 103 by publishing the '957 patent without leave of court.³ In their second
17 motion for contempt, the defendants argue that the plaintiffs violated the order filed at ECF No.
18 105 by (1) filing ECF No. 469 in this court and (2) filing a sealed document from this case in the
19 Eastern District of Wisconsin.⁴

20
21 ³ The defendants also assert that the plaintiffs argued in the Oregon action that the plaintiffs "had
22 a superior patent ownership claim" to the alleged trade secret vis-à-vis Wolff in part "because
this technology was not confidential" ECF No. 383 at 19 (simplified). As I have previously
explained, that is incorrect.

23 ⁴ The defendants also request to vacate the protective order in this case because they contend
there are no trade secrets in this case. I have addressed this contention in other orders, so I do
not address it further in this order. *See, e.g.*, ECF No. 467.

1 The plaintiffs respond that the '957 patent does not disclose the trade secrets at issue in
2 this case because the patent refers to creating a cavitation effect, which is not the subject of the
3 trade secrets. As for ECF No. 469 and the filing in Wisconsin, the plaintiffs assert that these are
4 not documents that were exchanged in discovery, so they do not fall within the protective order's
5 coverage. Additionally, the plaintiffs assert that ECF No. 469 reveals information that I had
6 already determined should be unsealed. They also contend that the filing in the Eastern District
7 of Wisconsin was done under seal in response to the defendants' argument that the plaintiffs'
8 motion for contempt in that court should fail because the plaintiffs gave the Eastern District of
9 Wisconsin court only redacted versions of certain documents.

10 "Civil contempt consists of a party's disobedience to a specific and definite court order
11 by failure to take all reasonable steps within the party's power to comply." *Inst. of Cetacean*
12 *Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 945 (9th Cir. 2014) (simplified). "The
13 party alleging civil contempt must demonstrate that the alleged contemnor violated the court's
14 order by clear and convincing evidence, not merely a preponderance of the evidence." *Id.*
15 (simplified).

16 1. First Motion for Order to Show Cause

17 The order at ECF No. 103 addressed the plaintiffs' motion to prevent the defendants from
18 sharing the plaintiffs' trade secret information with certain consultants, Wolff, and another
19 former Tomahawk employee, Samuel Gannon. *See* ECF No. 103 at 6. The protective order itself
20 is ECF No. 105.

21 The defendants do not cite to any particular provision of either order that the plaintiffs
22 violated by filing the '957 patent. More generally, the defendants do not explain how the
23 plaintiffs would violate the protective order by revealing some of the plaintiffs' own alleged

1 trade secret material through a public filing with the USPTO (or through any other means).
2 Thus, even assuming that is what the '957 patent does, the defendants have not shown the
3 plaintiffs are in contempt of the protective order. Consequently, I deny the defendants' first
4 motion for contempt, dismissal, or revoking pro hac vice applications.⁵

5 2. Second Motion for Order to Show Cause

6 In their second motion for an order to show cause, the defendants assert that the plaintiffs
7 violated the provisions of the protective order that limit the categories of who may review
8 documents that have been designated as confidential in this case because those categories do not
9 include a court. So, they assert that the plaintiffs violated the protective order by (1) filing ECF
10 No. 469 in this court and (2) filing under seal in the Eastern District of Wisconsin an unredacted
11 version of a sealed filing in this case.

12 ECF No. 469 is a "status report" that the plaintiffs filed in response to my order at ECF
13 No. 467 that unless the plaintiffs obtained relief from the Ninth Circuit by April 3, 2025, I would
14 unseal my order. On April 2, the plaintiffs filed ECF No. 469 which informed the court that they
15 would not be seeking relief from the Ninth Circuit but would be filing a motion to seal various
16 other documents on the docket. ECF No. 469 at 2. The plaintiffs also included commentary
17 about whether they have trade secrets. In doing so, they used some words and phrases that
18 previously had been sealed in this case. *Id.*

19 I find no basis to hold the plaintiffs in contempt for filing the status report. I had already
20 ordered the same information would be unsealed the next day if the plaintiffs did not obtain

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22 ⁵ The plaintiffs request sanctions for having to respond to this motion, but they do not identify
23 any rule, case, or statute in support nor analyze how the defendants' conduct supports sanctions
under the applicable law. Consequently, I deny the request. Additionally, if the plaintiffs
wanted to move for sanctions, they should have complied with Local Rule IC 2-2 and filed a
separate document event for a motion for sanctions.

1 appellate relief. Although the plaintiffs could have waited until I unsealed my order, said less
2 than they did in their status report, or simply filed nothing, I do not find their conduct worthy of
3 a contempt finding or sanctions.

4 I similarly decline to issue an order to show cause regarding the sealed filing in the
5 Eastern District of Wisconsin. The plaintiffs filed the document under seal in that court as well.
6 And the defendants can hardly be heard to complain. The defendants argued to the judge in
7 Wisconsin that he should not grant Formtec's pending motion without viewing unredacted
8 versions of the documents Formtec filed in that court. *See Formtec LLC v. Spherical IP LLC*,
9 1:23-cv-00516-WCG, ECF No. 51 at 4, 18-19 (E.D. Wis. Mar. 23, 2025). Additionally, it
10 appears based on the subject matter of that suit and the restricted filings on the docket that the
11 judge in that case already knows the alleged trade secret material that is revealed in the sealed
12 filing. I therefore deny the defendants' motion.

13 **C. Conclusion**

14 I THEREFORE ORDER that the defendants' motions for orders to show cause (**ECF No.**
15 **383, 470)** are **DENIED**.

16 I FURTHER ORDER that the defendants' unopposed request for judicial notice (**ECF**
17 **No. 472)** is **GRANTED**.

18 DATED this 15th day of May, 2025.

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21 ANDREW P. GORDON
22 CHIEF UNITED STATES DISTRICT JUDGE
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